closely for any indication of a shortage of payphones to meet user demands.

If it is found in the future that the payphone business is becoming unprofitable and phones are not available in geographic areas where they are needed, public interest payphones may be put in place. So far, we have not received any requests for public interest payphones.

Under the 1997 order, PAL service rates were continued at the same level. The tariff filing for PASPL rates was approved on a temporary basis in 1997 and is now made permanent. Rates for all other payphone services are continued at current levels on a permanent basis. No refunds will be issued because temporary rates set in 1997 are being made permanent without change.

CONCLUSION

Verizon's rates for PAL, PASPL and other payphone services are reasonable. Verizon's PASPL rate, set on a temporary basis in 1997, is made permanent. PAL rates and the rates for other payphone services will continue at current levels. IPANY's petition is denied.

The Commission orders:

1. The rates for Public Access Smart-Pay Line of Verizon New York, Inc. f/k/a New York Telephone Company, set on a temporary basis in the March 31, 1997 order in Case 96-C-1174, are allowed to become effective on a permanent basis.

2. Verizon New York, Inc. f/k/a New York Telephone Company's rates for public access line and other payphone services are continued at current levels.

3. The petition of Independent Payphone Association of New York, Inc. is denied.

4. These proceedings are continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary

EXHIBIT F

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on July 26, 2001

COMMISSIONERS PRESENT:

Maureen O. Helmer, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 99-C-1684 - Petition filed by the Independent Payphone Association of New York, Inc. that the Commission Modify New York Telephone Company's Wholesale Payphone Service Rates and Award Refunds.

Case 96-C-1174 - Proceeding on Motion of the Commission to Review Regulation of Coin Telephone Services Under Revised Federal Regulations Adopted Pursuant to the Telecommunications Act of 1996.

ORDER DENYING PETITION FOR REHEARING
OF OCTOBER 12, 2000 ORDER

(Issued and Effective September 21, 2001)

BY THE COMMISSION:

BACKGROUND

On October 12, 2000, the Commission issued its Order Approving Permanent Rates and Denying Petition for Rehearing, approving permanent rates for Public Access Smart-Pay Lines (PASPL) and continuing rates for Public Access Lines (PALs) and other payphone services at current levels. It also denied a petition of the Independent Payphone Association of New York (IPANY) for new rates for PALs and other payphone services and for refunds.

On December 8, 2000, IPANY filed a petition for rehearing of the October 12, 2000 Order, claiming the Order was inconsistent with federal law and Commission precedent. IPANY filed a letter supplementing its petition on January 3, 2001. Verizon filed a letter on January 3, 2001 asking the Commission to disregard IPANY's supplement or to extend the Reply date to January 16, 2001. Verizon filed its Opposition to IPANY's petition on January 16, 2001. On March 14, 2001, IPANY filed a letter attaching a copy of a Maryland PSC Order.

IPANY's Petition

In its petition, IPANY argues that Verizon's tariff does not meet the FCC's New Services Test,[1] which it says requires the use of forward looking, direct cost methodology. IPANY argues that the Commission's finding that Verizon's rates reflect direct embedded costs plus a reasonable contribution toward common costs and overhead was inconsistent with the New Services Test. IPANY says the Commission erroneously failed to follow the Federal Communications Commission (FCC) Common Carrier Bureau's March 2, 2000 Order. It argues that the Bureau's instructions to Wisconsin companies are a roadmap that also applies in New York.

IPANY continues that the 30% overhead cost used by the Commission is inaccurate, since it does not include the End User Common Line Charge (EUCL), Primary Interexchange Carrier Charge

[1] 47 CFR § 61.49(g)(2) governs the rate parameters for new service offerings that are payphone specific, network based features and functions used in configuring payphone operations. When a local exchange company (LEC) introduces a new service, it must set the rates for the new service based on direct costs plus a reasonable allocation for overhead.

(PICC) and Common Carrier Line Charge (CCL) paid by independent payphone providers to Verizon.

IPANY argues that the Commission should allow Total Element Long Run Incremental Cost (TELRIC) rates for PALs to non-competitive local exchange company (non-CLEC) payphone providers. It notes that the Commission required incumbent LECs to provide to non-carrier providers access to their directory databases to promote competition, when the FCC required access only to carriers.

IPANY contests Verizon's contention that Independent Payphone Providers (IPPs) should be treated like other retail business customers because it is more costly for Verizon to service them. IPANY argues that Verizon's costs are the same for providing payphone service to CLECs and IPPs.

Finally, IPANY argues that since the payphone industry is being hurt economically by competition from the cellular phone industry, payphone owners require lower PAL rates to remain viable. It states that over the last two years, 3,000 payphones were pulled from New York State by IPPs.[2] It concedes that Verizon has installed additional payphones during that time, but states they are mostly curbside locations in business areas of Manhattan, Brooklyn and Queens. The curbside locations allow advertising to subsidize costs and make the payphones profitable, according to IPANY.

IPANY's supplementary material includes a list of IPPs with declining stock prices and a Massachusetts Department of Telecommunications and Energy Order, which it argues, provides a separate rate category for PALs. IPANY also sent a Maryland PSC Order, which required an overhead-loading factor of 12% and followed the FCC Common Carrier Order of March 2, 2000.

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[2] IPANY's petition at 17.

VERIZON'S RESPONSE

Verizon opposes IPANY's petition for rehearing. It agrees with the Commission's October Order finding that the FCC Common Carrier Bureau Order applies only to certain Wisconsin companies named in the Order. Verizon points out that the principles in the Common Carrier Bureau Order have not been applied to the Wisconsin companies or to anyone else.

Verizon states that the Commission's October Order correctly applied the FCC's requirements for the New Services Test. It states that the FCC has approved contribution levels in excess of Verizon's PAL rates.

Verizon contests IPANYs contentions that providing PALs and other services to CLECs and IPPs are the same. It states that handling service requests, addressing repair problems and providing bills is more costly for IPPs than CLECs.

Verizon argues that the PICC charge should not be included in overhead because it provides for recovery of costs other than those incurred in providing PALs. Verizon also contends that IPANY incorrectly claimed that the New Services Test applied to usage rates. Verizon reiterates that the Test applies only to payphone-specific features, not usage.

Verizon argues that the Massachusetts Order does not support IPANY's position and instead holds that payphone service providers must be treated like retail customers by a LEC. Verizon claims that requiring TELRIC pricing of payphone services would hurt wholesale competition in New York. CLECs currently purchase payphone-related services from Verizon and compete with Verizon for retail PSP customers. According to Verizon, this competition keeps retail PAL rates low. Also, if PSPs received TELRIC rates, they would receive service for significantly less than other unregulated businesses.

Verizon contends that IPANY's arguments about the health of the payphone industry are irrelevant. It continues that the financial condition of some members of the industry does not justify a price break. Verizon notes that 2000 permits for new payphone lines will be issued in the first quarter of 2001. Verizon opposes any refunds in this proceeding.

DISCUSSION

IPANY has not raised any new issues in its petition that were not considered and rejected previously. We determined that Verizon's rates are consistent with the FCC's New Services Test, and that the FCC Common Carrier Bureau Order, by its terms, is not binding in New York. As pointed out in the October Order, CLECs are entitled to TELRIC rates for PALs as unbundled network elements (UNEs) under federal law, but payphone service providers (PSPs), as end users, are not. We again find persuasive Verizon's argument that it costs more to provide service to PSPs than to CLECs. As to the other state commission orders presented by IPANY, they are not binding on this Commission.

With regard to the payphone market, while we recognize that some competitors are struggling, the number of payphones in the State has experienced a modest decline in recent years.[3] We have not received a single request for a Public Interest Payphone (PIP), so there is no evidence that payphones in critical areas have been removed and the public is suffering as a result.

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[3] The number of payphones in New York declined by about 7% since 1995 (174,000 in 1995 to 161,000 in 2000). The number was 180,000 in 1998 suggesting a more significant decline rate, but also suggesting the market may be correcting for an overbuild.

CONCLUSION

IPANY has not raised any new issues or presented persuasive arguments that the October Order should be modified. IPANY's petition for reconsideration of the October Order is denied.

The Commission orders:

1. The petition for rehearing of the October 12, 2000 order by the Independent Payphone Association of New York is denied.

2. These proceedings are continued.

By the Commission,

(SIGNED) JANET HAND DEIXLER
Secretary

EXHIBIT G

STATE OF NEW YORK
SUPREME COURT   COUNTY OF ALBANY

In the Matter of

INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC. and TELEPLEX COIN COMMUNICATIONS, INC.

Petitioners,

-against-

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND VERIZON NEW YORK, INC.,

Respondents.

DECISION AND ORDER
Index No. 413-02
RJI No. 01-02-ST2369

APPEARANCES:

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Leslie E. Stein, J.

BACKGROUND

Petitioners commenced the instant Article 78 proceeding requesting that the Court set aside two determinations issued by the Public Service Commission (PSC) on October 12, 2000 and September 21, 2001, respectively. Petitioners initially requested[1] an Order granting the following relief: invalidating the rates charged by respondent, Verizon New York, Inc. (Verizon), for underlying pay telephone access lines, features and usage; directing Verizon to submit revised rates for public pay telephone access lines consistent with the Federal Communications Commission's (FCC) new services test, as specified in the FCC's Order of March 2, 2000; directing Verizon to submit further revisions to its rates for underlying pay telephone access lines in the future; and directing Verizon to refund to payphone service providers (PSPs) the difference between the rates for underlying payphone access lines paid by PSPs and the lawful rates which should have been charged by Verizon in accordance with the FCC's new services test, dating back to April 1, 1997.

In its answer to the petition, Verizon asserts a general denial and interposes the following affirmative defenses: that the petition fails to state a cause of action; that the subject public access line (PAL) rates were permanent and not subject to refund; that directing Verizon to file rates for payphone services approved by the PSC in the future is not relief that can be granted in an Article 78 proceeding; and that there is no legal basis for petitioner's request that the Court

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[1]As a result of an Order issued by the FCC after the commencement of this proceeding, some of petitioners' positions were modified and they subsequently requested that this matter be remanded to the PSC for further proceedings and that this proceeding be stayed pending the outcome of the PSC's actions.

require Verizon to comply with the March 2, 2000 decision of the Common Carrier Bureau (CCB) of the FCC, particularly since said decision was modified by the FCC on January 31, 2002 in a Memorandum Opinion and Order. In its answer to the petition, the PSC also asserts a general denial and raises the following objections in point of law: that petitioners' claim that the PSC has failed to conform to the FCC's January 31, 2002 Order is barred by petitioners' failure to exhaust its administrative remedies; and that said claim fails to state a cause of action.

The relevant facts reveal that petitioner, Independent Payphone Association of New York, Inc. (IPANY) is a trade association representing independent PSPs, which own and operate public pay telephones in New York State. IPANY's members provide payphone services in competition with Verizon and are also Verizon customers for purposes of obtaining PALs, which connect PSP telephones to the public switched telephone network, and other features. The rates for such services are set forth in tariffs filed by Verizon with, and approved by, the PSC. Teleplex Coin Communications, Inc. is a PSP within the State of New York.

The Telecommunications Act of 1996 (47 U.S.C. §251 *et seq.*) established a federal regulatory scheme designed "to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public" (47 U.S.C. §276[b][1]). Section 276(a) prohibits any Bell Operating Company (BOC) from discriminating "in favor of its payphone service". The FCC adopted regulations interpreting the requirements of the Act with respect to the calculation of costs of underlying payphone services. Pursuant to 47 USC §276(c), any state requirements that are inconsistent with the FCC regulations are pre-empted.

In addition, the FCC issued a series of Orders (the Payphone Orders). The Payphone Orders required that tariffed rates for underlying payphone services be cost based and non-discriminatory. The FCC also required that the tariffed rates comply with the federal "new services test". Under this test, costs are to be "forward looking", and the baseline for the cost calculation is direct cost, to which reasonable overhead may be added. Although certain tariffs were to be filed at the state level, only, and others were to be filed at both the state and federal levels, the FCC stated that it would initially "rely on the states to ensure that the basic payphone line is tariffed by the LECs [local exchange carriers] in accordance with the requirements of Section 276". The Orders further provided that states may conclude that further tariff revision filings are not required where LECs have existing tariffs that are consistent with FCC requirements.

In response to the Payphone Orders, the PSC issued an "Order Instituting Proceeding" in December 1996. That Order directed LECs to file tariff revisions by January 15, 1997, to take effect on April 15, 1997. Verizon (then known as New York Telephone) filed proposed tariff revisions with an effective date of April 1, 1997, introducing new services called Public Access Smart-Pay Lines (PASPLs), grandfathering services for "Coin Compatible Public Access Lines" and continuing, without change, other PAL services which had been in effect since 1992. The proposed rate levels for the new PASPLs are not at issue in this proceeding.

The PSC determined that Verizon's proposal satisfactorily demonstrated its compliance with the new federal law. Therefore, on March 31, 1997, the PSC issued an Order approving Verizon's tariff filing "to modify its coin telephone service offerings" on a temporary basis. The reason given by the PSC for making the approval temporary was that the new proposed rates "[had] not been tested in the coin telephone marketplace".

On July 30, 1997, the PSC invited interested parties to submit comments on Verizon's proposed tariffs. IPANY submitted comments asserting, among other things, that Verizon's rates were excessive and unlawful and urging the PSC to utilize the FCC's total element long run incremental cost (TELRIC) standard to calculate rates for underlying payphone services. Petitioners assert that TELRIC costs are based on "forward-looking economic costs", as opposed to "embedded" costs, which are historical costs. IPANY argues that Verizon also failed to demonstrate compliance with the new services test with respect to existing tariffs and alleges that Verizon committed to the FCC "to reimburse and provide credit to those purchasing the services back to April 15, 1997" if rates would be lower under the new services test.

Due to the fact that the PSC had taken no final action by December 1999, IPANY filed a petition with the PSC on December 2, 1999, renewing its contention that Verizon's charges to PSP's for access lines and usage did not comply with the FCC's new services test and requesting that the PSC require Verizon to file revised rates and to pay refunds to PSPs, retroactive to April 1, 1997, representing the difference between the rates actually in effect and the rates which should have been in effect since that date. IPANY again advocated that the rates should be established using the TELRIC methodology.

In response to IPANY'S petition, Verizon (then known as Bell Atlantic - New York) submitted data, including incremental cost data, that purported to show that the subject rates met the new services test, utilizing TELRIC data as the measure of direct costs for purposes of that test. However, Verizon asserted that, contrary to IPANY's claims, the FCC's Payphone Orders did not require the application of the new services test to the usage rates charged to independent PSPs. Verizon also asserted that, since the PAL rates were permanent, there was no basis for any alleged refund of PAL charges.

In March 2000, IPANY submitted reply comments to the PSC, addressing an Order of the CCB of the FCC dated March 1, 2000 (Wisconsin Order) in a case that involved the Wisconsin Public Service Commission. IPANY asserted that the Wisconsin Order described in detail how the new services test was to be applied in calculating rates for underlying payphone services and confirmed the approach advocated by IPANY to the PSC. Among other things, IPANY argued that the Wisconsin Order provides that Unbundled Network Elements (UNEs) are comparable to payphone line services and that the same overhead allocation should be used for both (see PSC 10/12/00 Order). IPANY also argued that the Wisconsin Order confirmed its position that end user line charges (EUCLs) and other similar charges should be subtracted in arriving at a cost-based PAL rate. IPANY asserted that the Wisconsin Order was a binding Order of the FCC and that the PSC was required to comply with that Order.

Verizon submitted rebuttal comments in April 2000, arguing that only the proposed PASPL rates were approved on a temporary basis, as the PAL rates had already been in effect on a permanent basis since 1992. Verizon further argued that its payphone-related rates were in compliance with the new services test, even though the Wisconsin Order was limited to only four Wisconsin LECs and was not binding on all state commissions. Verizon asserted that PSPs are to be treated as retail customers, as they are more costly to service than LECs, and that TELRIC is not the appropriate economic standard for developing long run incremental costs for retail services. Verizon also asserted that the new services test does not apply to usage rates because they are not payphone specific. In addition, Verizon argued that EUCLs and other similar charges should not be subtracted in arriving at a cost-based PAL rate. Finally, Verizon asserted that a review of the findings of the CCB in the Wisconsin Order was pending before the full FCC.

Based upon the foregoing, the PSC issued an Order on October 12, 2000, denying IPANY's petition, approving on a permanent basis the rates for PASPLs which were established on a temporary basis by the March 31, 1997 Order, and continuing the existing rates for PALs and other payphone services. In doing so, the PSC concluded, among other things, that the Wisconsin Order applied only to the four Wisconsin companies named therein and was not binding on the PSC, that Verizon's rates satisfied the new services test and that petitioners were not entitled to refunds. The PSC also specifically found in that Order that only the PASPL rates had been set on a temporary basis in 1997 and that the existing rates for Verizon's payphone services "recover direct embedded cost plus a reasonable contribution toward common costs and overhead" at 30% above direct embedded costs. Based upon the FCC's traditional acceptance of rates that were one to two times above direct embedded costs under the new services test, the PSC found Verizon's rates to be reasonable. The PSC further found that, "given the retail functions involved in providing service to PSPs (as opposed to CLECs), it is not clear the UNEs are 'comparable services' to payphone line services". Therefore, the PSC concluded that PSPs are not entitled to TELRIC rates for PALs.

On December 8, 2000, IPANY filed a petition for a rehearing of the PSC's October 12, 2000 Order, which was opposed by Verizon. On September 21, 2001, the PSC issued an Order Denying Petition for Rehearing of October 12, 2000 Order. The PSC found in part that:

> IPANY has not raised any new issues in its petition that were not considered and rejected previously. We determined that Verizon's rates are consistent with the FCC's New Services Test, and that the FCC Common Carrier Bureau Order, by its terms, is not binding in New York. As pointed out in the October Order, CLECS [competitive local exchange companies] are entitled to TELRIC rates for PALs as unbundled network elements (UNEs) under federal law, but payphone service providers (PSPs), as end users, are not. We again find persuasive Verizon's argument that it cost more to provide service to PSPs than to CLECs. As to the other state commission orders presented by IPANY, they are not binding on this Commission.

This proceeding was commenced on January 18, 2002. Thereafter, on January 31, 2002, the full FCC issued an Order (January Order), modifying the Wisconsin Order. The January Order provides, among other things, that:

1. The new services test requires the use of "forward-looking cost methodologies";

2. The Wisconsin Order did not mandate the exclusive use of TELRIC methodology pricing;

3. UNE overhead loadings do not serve as an absolute "default ceiling";

4. The new services test applies to usage-sensitive elements of the services offered to PSPs;

5. Under the new services test, a BOC may not charge more for payphone line service than is necessary to recover from PSPs all recurring direct and overhead costs incurred by BOCs in providing payphone lines. Therefore, "in establishing its cost-based, state-tariffed charge for payphone line service, a BOC must reduce the monthly per line charge determined under the new services test by the amount of the applicable federally tariffed SLC" [subscriber line charge] (such as the EUCL charge).

In the January Order, the FCC explicitly affirmed the CCB's conclusion that "section 276 requires BOC's to set their intrastate payphone line rates in compliance with the Commission's cost-based, forward-looking 'new services' test". The FCC further noted that the new services test had been interpreted differently in various states (referring to IPANY's Comments to the PSC, among other things) and intended the January Order to "assist states in applying the new services test to BOC's intrastate payphone line rates in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276".

Referring to the Wisconsin Order, the FCC also stated in the January Order, as follows:

> The *Bureau Order* confirmed our longstanding policy that the new services test requires the use of consistent methodologies in computing direct costs for related services. As a result, the *Bureau Order* stated, cost study inputs and assumptions used to justify payphone line rates should be consistent with the cost inputs used in computing rates for comparable services offered to competitors...The *Bureau Order* stated that overhead allocations must be based on cost and may not be set artificially high in order to subsidize or contribute to other services (citations omitted).

ARGUMENTS OF THE PARTIES

In the instant Article 78 proceeding, petitioners assert that the PSC's Orders and Verizon's rates fail to comply with the new services test because they: use embedded costs rather than forward looking direct economic costs; contain overhead allocations significantly exceeding the allocations for comparable services, such as unbundled UNEs; do not follow the new services test methodology in setting rates for usage services; and fail to take into account other sources of revenue, including EUCLs, resulting in double recovery of costs for Verizon.

Petitioners argue that the January Order is a clarification of the Wisconsin Order, that both Orders are binding on the PSC in this matter (except to the extent that the Wisconsin Order was modified by the January Order) and that the PSC Orders being challenged herein do not conform with either of those Orders. However, because the FCC did not completely uphold the Wisconsin Order and further clarified the applicable standards for rate-setting, petitioners request that this Court set aside the rates approved by the PSC and remand the matter to the PSC to establish new rates consistent with the new services test as set forth in the January Order.

Finally, petitioners argue that they are entitled to a refund or credit for excess tariffs paid by virtue of the failure of Verizon's rates to comply with the new services test, pursuant to a letter dated April 11, 1997 from counsel to the RBOC Payphone Coalition (which included Verizon's predecessor) to the Deputy Chief of the CCB and pursuant to the subsequent Order of the CCB dated April 15, 1997.

In its opposition to the petition, Verizon asserts that the Court must allow the PSC wide discretion in exercising its statutory rate-setting power and may not set aside its determinations "unless they are without rational basis or reasonable support in the record", (citing Matter of Rochester Tel. Corp. v Public Serv. Commn., 87 NY2d 17, 29). Verizon argues that the PSC's determinations herein had a reasonable basis.

Verizon contends that its December 1996 tariff filing did not propose any change in the rates for PALs or for usage, that IPANY did not seek refunds of PAL rates until its December 2, 1999 petition to the PSC and that said petition did not seek any refunds of usage rates. Verizon further contends that the Payphone Orders indicated that usage rates would not be subject to the new services test or to the other requirements of the Orders.

In addition, Verizon asserts that, while the PSC's Order of March 31, 1997 concerning the December 1996 filing did refer to a comparison of rates with the embedded costs of services, two separate analyses were provided by Verizon which used incremental costs, including TELRIC costs, as a measure of direct costs for purposes of the new services test. Thus, the PSC also noted that the filing had been supported by "long run incremental cost ('LRIC') analysis", which are forward-looking costs. Verizon asserts that this data demonstrated that both the existing rates and the proposed new rates satisfied the new services test.

Verizon argues, however, that the use of embedded costs would also have been reasonable at the time of the challenged Order because the new services test does not prescribe the use of any particular type of costs as a measure of the direct costs of a tariffed service and, prior to the Wisconsin Order, the FCC had held that embedded or historical costs could be used as such a measure.

Verizon also asserts that the Wisconsin Order does not apply to this case by its terms due to the fact that the CCB was only addressing the application of the new services test to four

Wisconsin LECs. Verizon also contends that it was reasonable for the PSC to determine that the level of overhead costs included in its payphone rates met the new services test, based upon the FCC's approval of significantly higher levels in the past.

With regard to the claim that Verizon was required to take into account other sources of revenue from other rates, such as the EUCL, in order to avoid a double recovery of costs, Verizon argues that, since it has been determined that PSPs are retail customers, absent a contrary holding from the FCC, it was reasonable for the PSC to conclude that it should continue to assess the EUCL on PSPs, as it does on all other retail customers. Nevertheless, Verizon asserts that the two analyses which it conducted for new services test purposes that were presented to the PSC did, in fact, take the EUCL into account.

In general, Verizon argues that, even if the Wisconsin Order was not limited to the four named LECs, it was intended to have only prospective effect. Verizon further argues that the language of the January Order indicates that it was intended to serve as a future guide to states and that the fact that the January Order modified significant aspects of the Wisconsin Order demonstrates that using the latter as a "road map" for applying the new services test, as advocated by petitioners, would have been incorrect. Verizon also argues that Article 78 of the CPLR does not provide any basis for this Court to direct the PSC to implement the January Order.

Finally, Verizon argues that, since the subject PAL rates have been permanent since before 1996, neither the Court nor the PSC have the authority to require that a refund be made of amounts collected, regardless of any later finding that the rates are unreasonable and should be changed. Verizon further asserts that neither the RBOC letter to the FCC or the FCC Order in response to that letter provides a basis for a refund of PAL charges, since they did not deal with instrastate tariffs that were already in place. According to Verizon, the letter and Order "only applied in those instances in which a LEC had recognized a need to make a filing to meet the New Services Test, could not make the required filing within the time-frame specified in the *Payphone Order*, but made the filing by May 19, 1997.

The PSC has also raised several issues in opposition to the petition. First, the PSC argues that petitioners' claim that the PSC failed to comply with the January Order has not been raised with the PSC. Therefore, the PSC asserts that judicial review is barred by petitioners' failure to exhaust their administrative remedies with regard to that claim. The PSC also argues that any compliance with the January Order that may be required is prospective, only, since filed rates which have already been approved cannot be modified retroactively. The PSC also agrees with Verizon's contention that the Wisconsin Order was, by its very terms, not binding in this state.

The PSC also alleges that, in approving the continued use of Verizon's PAL rates, it "assured that the PAL rates were forward-looking by comparing the rates to Verizon's long-run incremental cost analysis"and that it complied with the FCC requirements regarding treatment of the EUCL <u>existing at the time of its determinations</u>. Therefore, it argues that it properly determined that the PAL rates met the new services test and could be continued.

Finally, the PSC asserts that there is no statutory authority to allow a Court or a commission to order reparations against previously filed rates. Moreover, the PSC argues that, since the rates in effect are proper, there is no basis for any refund. The PSC also argues that Verizon did not take advantage of the extension of time to file its tariffs in compliance with the new services test, as it filed its proposed new tariffs in December 1996. Thus, the PSC argues that Verizon was not bound by the refund requirement.

In reply to respondents' arguments, petitioners argue that, where the FCC has set standards and criteria to be followed by the states, the PSC has no discretion on whether or not to apply them. Petitioners further argue that, while there may have been some question about the methodology to be used in applying the new services test, "there has never been any question that the New Services Test...required the use of forward-looking, direct costs". Petitioners assert that Verizon's pre-existing rates were based on embedded, or historical, costs and that, contrary to respondents' contention, there is no authority for the use of historical embedded costs.

Petitioners also assert that the language of both the Wisconsin Order and the January Order confirm that the former set forth "the methodological principles" to be applied in implementing the new services test. Petitioners argue that, since the new services test is a uniform national requirement, the provisions of the Wisconsin Order were applicable to all LECs and all state commissions. Petitioners also note that the language in the Wisconsin Order limiting its effect to the specified Wisconsin LECs referred only to the requirement that those LECs submit data to the FCC.

Petitioners assert that the intended general application of the principles enunciated in the Wisconsin Order is confirmed by the language of the January Order. They also note that the LEC Coalition urged the FCC to stay the Wisconsin Order on the grounds that numerous state payphone associations (including IPANY) were urging their state commissions to adopt the methodologies set forth in the Order and that adoption of TELRIC rates by the states would cause irreparable harm to the LECs. Petitioners argue that these actions belie Verizon's claim that the Wisconsin Order was limited to the State of Wisconsin.

Petitioners assert that the January Order upheld almost all of the major requirements of the Wisconsin Order, including those which: mandated application of the new services test by state commissions; mandated use of a forward-looking cost methodology; mandated subtraction of the EUCL from the proposed rate; precluded use of the same overheads used to calculate normal business line rates; and mandated application of the new services test to usage services. Petitioners contend that the PSC's Orders failed to comply with each one of those requirements. Since those requirements were not changed and since the Wisconsin Order has been in effect since March 2, 2000, petitioners argue that respondents have always been in violation of the Wisconsin Order and that initiation of this proceeding challenging those aspects of the PSC's Orders was proper. They further argue that, even if respondents are correct that petitioners have failed to exhaust their administrative remedies, one remedy would be to remand back to the PSC for further proceedings, a result that petitioners support.

Petitioners assert that respondents have not shown that the pre-existing PAL rates were forward-looking, as there is no indication that the LRIC analysis referred to by respondents had anything to do with those rates. Moreover, they argue that an agency may not seek to defend its Order on any grounds other than the grounds initially cited by the agency in support of its decision (citing Matter of Central NY Coach Lines, Inc. v Larocca, 120 AD2d 149 at 152). Therefore, petitioners contend that the PSC cannot assert, for the first time before this Court, that it approved the rates in question because it concluded that they were based on forward-looking costs.

With regard to petitioners' claim for refunds, they argue that Verizon did, in fact, take advantage of the waiver granted pursuant to the FCC's Order by filing revisions to its intrastate tariff on May 19, 1997 and again on July 21, 1997. Petitioners assert that those tariff filings did